



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. PD-0228-16

THE STATE OF TEXAS

v.

VICTORIA MARI VELASQUEZ, Appellee

**ON APPELLEE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH COURT OF APPEALS
BEXAR COUNTY**

HERVEY, J., filed a concurring opinion.

O P I N I O N

Although I agree with the majority opinion, I write briefly to express some of my own thoughts with respect to the issues in this case.

There is no dispute that the State was aware of the motion to suppress filed by the defense and that it had notice of the trial date. There is equally no dispute that the State should have been ready to prosecute its case on the day of trial, including the suppression issues. The problem seems to have stemmed from the State's mistaken reliance on what it

believed was the judge's "preference" to carry suppression motions to trial. According to the State, that is why it was not prepared. The trial judge explained that was not his policy, and that he would hold suppression hearings before trial if they could be dispositive, as was the case here. Regardless, a judge's preference or tendencies are just that. They are not the law. But it should be the State's policy to be prepared to prosecute its case on the day of trial.

As to the State's lack-of-notice complaint, I make three observations. First, the State did not ask for a continuance. Second, if the State is claiming that it could not meaningfully participate in the proceedings because its witnesses were not present and ready to testify, that concern is without merit. The judge told the State that it was not going to allow live testimony at the hearing pursuant *Ford v. State*, 305 S.W.3d 530 (Tex. Crim. App. 2009). Finally, the State does not claim that it did not have other evidence to support its case due to a lack of notice. In fact, the opposite is true. Despite any alleged lack of notice, the State conceded that it had in its possession at the hearing the offense report, but it expressly declined to offer any evidence because it would not participate in "this sort of motion to suppress." The lack-of-notice issue appears to be more of a "straw man" argument than a legitimate concern.

I also find it troubling that the State appeared more interested in "taking its ball and going home" than participating in the proceeding in good faith. If the State had proffered the offense report (and any other information it had), it may have won the

suppression hearing. And if not, it could have appealed that decision. TEX. CODE CRIM. PROC. art. 44.01(a)(5) (the State has the right to appeal an order granting a motion to suppress). It is hard to sympathize with the State under these circumstances.

This case seems to be less about a lack of notice than it is about a battle of wills between the prosecutor and the trial judge.

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